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SALES OF STANDING TREES.

ARE sales of standing trees within the Statute of Frauds? Do they involve any "interest in or concerning land"?

This question arises in various ways: sometimes in a suit by the buyer against the seller for breach of contract in not allowing him to remove the trees; sometimes in a suit by the seller for the price of the trees which the buyer has or has not taken away; sometimes in actions of trespass by the seller against the buyer for entering on the land and cutting the trees, either after or before having been forbidden to do so, or *vice versa;* and occasionally in an action between the buyer and a subsequent grantee of the land before the trees have been cut, and either with or without notice of the prior sale of the trees. Different considerations may apply under these different circumstances, which may in part account for some of the apparently conflicting views expressed on this question. It may not be possible to reconcile all the decisions, much less all the *dicta*, on this subject, but the general drift of the cases seems to support several propositions.

1. The first is where the vendor has expressly stipulated that the trees may remain standing on the land a given *number of years*, if the purchaser elects. Here, as they may, and probably will, derive more or less growth and increase from the soil, there is some reason to hold that the sale involves an "interest in land." In fact it has been considered a sale not only of the trees as they then

are, but as they will be at the end of the stipulated period, with all the additions to them subsequently acquired from the soil.

The case of Green *v.* Armstrong,[1] deserves to be considered the leading one on this point. The vendee there had the right to cut and carry away the trees "at any time within twenty years;" and after he had cut a part, the vendor forbid him to cut the rest, — or, in other words, revoked his license, — and the vendee brought an action on the contract for damages, but it was held he could not recover as the contract was only oral. This decision has been often approved in New York.[2]

The subject was elaborately examined with the same conclusion in Kingsley *v.* Holbrook,[3] where the time allowed was three years; and this was approved in Howe *v.* Bachelder.[4]

2. The second class of cases is where the trees are to stand for an *indefinite time*, and to be severed solely at the pleasure of the buyer. Here also some decisions and more *dicta* declare that the same rule applies and that the Statute requires a writing.

Buck *v.* Pickwell[5] is one of the most important of this class. There the purchaser of the trees had an absolutely indefinite time in which to take them off. The vendor sold and conveyed the land before the trees had been cut, and after twenty years a subsequent grantee of the land, whose deed contained no reservation of the trees, cut and carried away the remainder, and the first purchaser sued him in *trespass* for cutting down his growing trees. Obviously, the case on those facts could be decided in only one way; for even if the oral sale had been held originally valid, the subsequent conveyance of the land before the trees had been cut would have revoked the license to enter and cut them, and the plaintiff would have been liable to the defendant in trespass for such act; of course, then, he could hardly expect the defendant would be liable to him for the very same cutting. The point of revocation, however, does not seem to have been made in the case, and although the decision itself is correct, even on the ground upon which it was put, yet the same court has declined to extend it "beyond the very point in judgment."[6]

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[1] 1 Denio, 550 (1845).

[2] See McGregor *v.* Brown, 6 Seld. 114; Vorsebeck *v.* Roe, 50 Barb. 302; Goodyear *v.* Voseburgh, 57 Barb. 243.

[3] 45 N. H. 313 (1864).

[4] 49 N. H. 204 (1870). See also Putney *v.* Day, 6 N. H. 430 (1833), and Olmstead *v.* Niles, 7 N. H. 522 (1835), where the time allowed was twenty-five years.

[5] 27 Vt. 157 (1854).

[6] See Sterling *v.* Baldwin, 42 Vt. 309.

Scorell *v.* Boxall[1] is very similar. The plaintiff had bought a lot of growing underwood which the defendants (not the vendor) cut and carried away, and for which the buyer brought trespass, "a possessory action;" and it was held he had not such a possession as to enable him to maintain that particular action, though the language of the judges might have been more general. Conversely, in Harrell *v.* Miller[2] the subsequent vendee of the land, with no reservation of the trees, was allowed to recover against a previous oral buyer of them who, after the deed had been made, cut and carried away the trees.

Pennsylvania has also frequently declared that if the trees are to stand an indefinite time the sale is within the Statute.[3] The time of the removal was also indefinite in Hostetter *v.* Auman,[4] with the same result.[5]

Some of the objections raised in these cases to indefinite licenses would be obviated, or diminished at least, by construing the license to continue only for a reasonable time, which might be considered to be only so long as the trees were in substantially the same condition as when sold. On that view, the license would terminate and the trees be forfeited, if allowed to stand too long.[6]

3. Still another view is that if the trees are sold "as trees," and are not to be first cut by the vendor and delivered in their new condition, it is immaterial whether they are to stand, or do in fact stand, a long or a short time after the sale; in either case they are to be considered at the time of sale as realty, and therefore the Statute applies. This subject was recently examined in Hirth *v.* Graham,[7] where it was held to be immaterial whether the parties did or did not contemplate an immediate severance and removal of the trees, the contract of sale was invalid if not in writing; so invalid that even the buyer could not maintain an action upon it against the seller for refusing to allow him to take the trees, — the Court saying, "the question whether such sale is a sale of an interest in or concerning land, should depend, *not upon the intention of*

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[1] 1 Y. & J. 396 (1827).

[2] 35 Miss. 700 (1858).

[3] Pattison's Appeal, 61 Pa. St. 294 (1869); Bowers *v.* Bowers, 95 ib. 477 (1880); Miller *v.* Zufall, 113 ib. 317 (1886.)

[4] 119 Ind. 7 (1888).

[5] See also Yeakle *v.* Jacob, 33 Pa. St. 376; Huff *v.* McCauley, 53 Pa. St. 206.

[6] See Hill *v.* Hill, 113 Mass. 103; Hill *v.* Cutting, ib. 107; Gilmore *v.* Wilbur, 12 Pick. 120; Heflin *v.* Bingham, 56 Ala. 566.

[7] 50 Ohio St. 57 (1893).

the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber, is that of realty."

This rule certainly has the merit of simplicity and ease of application, avoiding, as it does, an inquiry as to the precise time the trees are to stand before they are to be cut by the buyer, and whether such time is or is not reasonable. It has many respectable authorities in its support.[1]

4. On the other hand, there is much authority as well as reason for holding that if either expressly or by a fair construction of the contract, the trees are *forthwith* or *within a reasonable time* to be cut and severed from the realty and thus made personal property (no matter by which party), and are not to gain additional growth and size from the soil, it is not a sale of any "interest in land" and not within the Statute.

The earliest announcement of this doctrine seems to be in 1 Ld. Raymond, 182 (1697), and where it is thus stated: "Treby, C. J., reported to the other Justices that it was a question before him in a trial at *nisi prius* at Guildhall, whether the sale of timber growing upon the land ought to be in writing by the Statute of Frauds, or might be by parol. And he was of opinion and gave the rule accordingly, that it might be by parol, because it is but a bare chattel. And to his opinion Powell, J., agreed." This report is rather indefinite as to the terms and nature of the sale, and perhaps could not be pressed into supporting sales of trees to stand a long time on the vendor's land. Maine seems to have first adopted this view in America, for in Erskine *v.* Plummer,[2] it was held that a sale of timber by parol to be cut and carried away by the purchaser "within a reasonable time, or as soon as it can conveniently be done," is not within the Statute. Banton *v.* Shorey,[3] is similar.

So in Whitmarsh *v.* Walker,[4] the defendant orally sold the plaintiff two thousand mulberry-trees then growing in his nursery, which were "raised to be sold and transplanted," and which were to be delivered on the ground by the defendant when called for. The defendant refused to deliver, and the action was for a breach

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[1] See Slocum *v.* Seymour, 36 N. J. L. 138; Owens *v.* Lewis, 46 Ind. 488, where the subject is elaborately considered, and is approved in Armstrong *v.* Lawson, 73 Ind. 500. And see Coody *v.* The Gress Lumber Co., 82 Ga. 798; Daniels *v.* Bailey, 43 Wis. 566; Knox *v.* Haralson, 2 Tenn. Ch. R. 237; Summers *v.* Cook, 28 Grant, Ch. 179; Rhodes *v.* Baker, 1 Ir. Com. L. R. 488 (1851), and many other cases.

[2] 7 Greenl. 447 (1831).

[3] 77 Me. 48 (1885).

[4] 1 Met. 313 (1840).

of that contract. It was held that the sale was valid, though oral; that the defendant undertook to either sever the trees from the soil, and deliver them to the plaintiff, or else to permit the plaintiff to sever them, and it was immaterial whether the severance was to be made by the plaintiff or by the defendant. And although the license to the plaintiff to enter and sever them passed no interest in the land, and might be revoked by the defendant before the trees were removed, yet, said the Court, "if he exercised his legal right in violation of his agreement, he is responsible in damages," and the plaintiff had a verdict.

In Claflin *v.* Carpenter,[1] the plaintiffs had sold to one McDavit "a quantity of wood and timber, part of which was cut and lying on their land, and part uncut and standing," and McDavit immediately mortgaged it back to them to secure the payment therefor, which mortgage was recorded only in the records of mortgages of personal property, and not in the registry of deeds of real estate. McDavit subsequently sold and delivered some of the wood to the defendant, who had no knowledge of the mortgage. It was held that both the wood which was cut and that which was standing when the mortgage was made was to be considered as personal property and not real estate; that the mortgage was properly recorded as a personal property mortgage, and that trover would lie against the purchaser after a demand and refusal. See also Cain *v.* McGuire.[2] In Nettleton *v.* Sikes,[3] the plaintiff orally contracted with the defendant that he might cut a quantity of white oak trees on the plaintiff's land, take the bark therefrom at a certain price per cord, and cut up the wood for the plaintiff, at the market price for cutting. The defendant cut a number of the trees and peeled the bark therefrom, but before it had been taken away he was forbidden by the plaintiff to enter again upon the land. Subsequently the defendant did enter and carry away the bark, for which the plaintiff brought *trespass quare clausum*. It was held that if the defendant merely had a *license* to enter, it might be revoked, and the action would lie; but that if there was a valid *contract* that he might cut the trees and take off the bark, it could not be revoked or rescinded after the bark had been peeled, so as to make him a trespasser for carrying it away, and that an oral contract was suffi-

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[1] 4 Met. 580 (1842).

[2] 13 B. Monr. 340 (1852); Douglas *v.* Shumway, 13 Gray, 502 (1859).

[3] 8 Met. 34 (1844).

cient. The action was not maintained. In Byassee *v.* Reese,[1] the oral sale was held good even as against a subsequent grantee of the land without notice of the sale, the trees, however, having been already selected and marked by the buyer. This is the very strongest effect that can be given to such an oral sale, and may perhaps have gone too far in that direction.

Smith *v.* Bryan[2] (often cited in favor of the oral contract) does not really add much strength to that view. There the owner of land sold by writing (but apparently not under seal) a quantity of oak and pine trees then standing on his land, for $1,200, with two years to remove them. The buyer cut and carried away some of the trees, and then orally *resold to the owner of the land* those uncut, which he refused to pay for; and in a suit for the price the Court held that the plaintiff could recover. See also Green *v.* North Carolina Railroad Co.[3] Clearly so; the buyer could hardly expect to keep his trees and his money too. A statute that permitted such results would be a statute of frauds indeed!

Perhaps the most important recent case on this subject is that of Marshall *v.* Green.[4] The plaintiff on the 27th of February orally sold the defendant twenty-two standing trees, "to be got away as soon as possible." On the 2d of March the defendant cut six of the trees, when the plaintiff countermanded the sale, demanding an alteration of the terms. The defendant, notwithstanding, proceeded to cut the remaining trees on the 3d and 4th of March, and carried them all away. Whereupon the plaintiff brought an action in one count for trespass to the land, and a second count for trover. He was not allowed to recover on either count, because the oral sale was held valid and not within the Statute, — Coleridge, J., saying: "If the matter were *res integra*, I should be inclined to think there was much to be said for Littledale's, J., view, that the words of the Statute were never meant to apply to such a matter as this at all, but only referred to such interests as are known to conveyancers. It is, however, too late now to maintain this view, inasmuch as there are a great number of decisions which proceed on the opposite view. It is clear on the decisions that there are certain natural growths which, under certain circumstances, have been held to be within the words of the section, and a contract with respect to which must therefore be in writing. The question then is,

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[1] 4 Met. (Ky.) 372 (1863).
[2] 5 Md. 141 (1853).
[3] 73 N. C. 524 (1875); Teal *v.* Auty, 2 Br. & B. 99.
[4] 1 C. P. Div. 35 (1875).

Which is the rule to be? The matter has been much discussed, and for my part I despair of laying down any rule which can stand the test of every conceivable case.

It is said that there is an interest in lands within the statute when the sale is of something which, before it is taken away, is to derive benefit from the land, and to become altered by virtue of what it draws from the soil. The rule is an intelligible one, but one which it is almost impossible to apply with absolute strictness. The effect of such a rule, if strictly applied, would vary at different times of the year. If the sale was in the spring, and the removal of the thing sold were to be postponed but for two or three days, it would not, at its severance, in strictness be in the same state as it was at the time of sale. On the other hand, in winter, when the sap is out of the tree, and it is standing, as it were, dead for the time being, there would be no appreciable change. It is almost impossible to say that the rule can be that, wherever anything, however small, is to pass into that which grows on the land out of the land, between the sale and the reduction into possession the contract is within the section." Brett and Grove, JJ., concurred in these general views, and the verdict for the plaintiff was set aside.

This class of cases is based upon the principle that the contract is to be considered as an executory agreement for a sale, to take effect only when the trees are severed from the land, and converted into personal property, coupled, however, with a license to the purchaser to enter, sever, and remove the trees, if the seller is not to do so.[1] The moment they are cut they become the personal property of the purchaser and may be sold by him, like any other personal property, and *his* purchaser has the same right to go and take them away; for the license to remove then becomes irrevocable.[2] The license may be revoked *before* the cutting, since the trees are not yet the property of the purchaser, and if revoked, his only remedy is against the seller for breach of contract in not allowing him to enter and take the trees, the same as in a refusal to deliver any other personal property contracted for. This was the case in Whitmarsh *v.* Walker.[3] In other words, the buyer of

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[1] See Hill *v.* Hill, 113 Mass. 103 (1873); United Society *v.* Brooks, 145 Mass. 415 (1888); Fletcher *v.* Livingston, 153 Mass. 390 (1891).

[2] Yale *v.* Seely, 15 Vt. 221 (1843); Nelson *v.* Nelson, 6 Gray, 385 (1856); Cool *v.* The Peters Box and Lumber Company, 87 Ind. 531 (1882).

[3] 1 Met. 313.

trees by an oral bargain with leave to enter, cut, and carry them away forthwith, acquires no interest *in* the land, but only a license to enter *upon* the land, etc., a mere permission, which prevents such entry from being a trespass, but which may be revoked before it is acted upon; and an entry afterwards would undoubtedly be a trespass for which an action would lie.[1] But this does not touch the question of the liability of the vendor to the vendee for revoking the license, and so depriving the vendee of the power to take and carry away his purchase, which is the real test of the validity of the contract. Much stress seems to be sometimes laid on the circumstance which party is to cut the trees. That seems quite immaterial, except that where the seller agrees to do so, and to deliver the thing sold, either as cordwood or as timber, *it more clearly appears* to be a sale, not of trees, but of what had once been trees, but was so no longer. This was really the case of Smith *v.* Surman.[2] The seller was to cut the trees and *measure them* in order to ascertain the price, as the sale was of "timber," at so much per foot. The judges thought it was not a sale of "standing trees" at all, but only of so many feet of timber, and of course not within this branch of the Statute. And this has been so held even in New York, notwithstanding the case of Green *v.* Armstrong.[3] But if the *vendee* has a right to enter and cut the trees and *does so*, they are thereby changed into personal property as much as if cut by the vendor, and it can make no difference by whom the axe is wielded.

Any article on the sale of standing trees would certainly be incomplete which made no allusion to two other somewhat similar sales, namely, that of annual crops, and that of other articles usually considered as parts of the realty.

1. It now seems to be the better rule that sale of annual crops, such as potatoes, turnips, etc., are not within the Statute, whether they are then mature or not. In some instances apparently the crop attained most of its growth after the sale, but that fact was thought quite immaterial.[4] The same rule has often been declared

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[1] Giles *v.* Simonds, 15 Gray, 441 (1860); Drake *v.* Wells, 11 Allen, 141 (1865).

[2] 9 B. & C. 561; 4 M. & R. 455 (1829).

[3] 1 Denio, before cited. Killmore *v.* Howlett, 48 N. Y. 569; Boyce *v.* Washburn, 4 Hun 792.

[4] Parker *v.* Staniland, 11 East, 362; Warwick *v.* Bruce, 2 Maule & S. 208; Evans *v.* Roberts, 5 B. & C. 829; 8 D. & R. 611; Dunne *v.* Ferguson, Hayes, 540; Sainsbury *v.* Matthews, 4 M. & W. 343, a marked case; Jones *v.* Flint, 2 P. & D. 594; 10 Ad. & El. 753.

in this country.[1] So also as to crops of growing grain.[2] The same principle has been extended to natural crops, such as grass, fruit, etc.[3]

Mr. Browne, in his excellent work on the Statute of Frauds, thus states the result of his thorough and critical examination of all the cases on this point, He says (Sect. 237): —

"Upon a careful examination, the more approved and satisfactory rule seems to be that, if sold specifically, and to be by the terms of the contract delivered separately and as chattels, such a contract of sale is not affected by the fourth section of the statute, as amounting to a sale of any interest in the land, and that the rule is the same when the transaction is of this kind, *whether the product sold be trees, grass, and other spontaneous growth, or grains, vegetables or other crops raised by periodical cultivation.*"[4]

2. As to the second class of cases referred to, namely, that of sales of articles attached to the freehold and which would pass with a deed of the land itself, unless reserved, it is now commonly thought (though even here some diversity exists) that oral sales may be valid of such things as old buildings to be presently removed or torn down, piles of manure, gravel hills, loads of stone or loam, stacks of peat in process of curing, ice ponds, stone walls, etc., all to be taken and carried away.[5]

Probably the earliest case on this subject is Boswick *v.* Leach.[6] There the plaintiff had orally sold to the defendant parts of his gristmill, such as mill-stones, running gear, etc., but which the defendant refused to take away and pay for. The plaintiff was allowed to recover the price, — the Court saying that "where there is a sale of property which would pass by a deed of the land, but

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[1] Northern *v.* The State, 1 Ind. 113; Bull *v.* Griswold, 19 Ill. 631; Bricker *v.* Hughes, 4 Ind. 146.

[2] Westbrook *v.* Eagar, 16 N. J. L. 81; Bryant *v.* Crosby, 40 Me. 22; Austin *v.* Sawyer, 9 Cow. 39; Marshall *v.* Ferguson, 23 Calif. 65; Davis *v.* McFarlane, 37 ib. 634.

[3] Cutler *v.* Pope, 13 Me. 377; Purner *v.* Piercy, 40 Md. 212; Vulicevich *v.* Skinner, 77 Calif. 239; Smock *v.* Smock, 37 Mo. Ap. 56, an excellent case on this point, though even here the decisions are not uniform.

[4] See also Sterling *v.* Baldwin, 42 Vt. 306; Marshall *v.* Green, 1 C. P. Div. 35.

[5] See Higgins *v.* Kusterer, 41 Mich. 318; Shaw *v.* Carbrey, 13 Allen, 462; Long *v.* White, 42 Ohio St. 59; Poor *v.* Oakman, 104 Mass. 316; Strong *v.* Doyle, 110 Mass. 93; Gile *v.* Stevens, 13 Gray, 146; Georgeson *v.* Geach, 3 Vict. L. R. (Cases at Law) 144.

[6] 3 Day, 476 (1809).

it can be separated and by the contract is to be separated, such a contract is not within the Statute. Such are contracts for the purchase of gravel, stones, timber, trees, and the boards and bricks of houses to be torn down and carried away."

The result of our examination of the cases on this whole subject is that neither the distinction between natural and artificial crops, nor between mature and immature crops, nor whether the buyer or the seller is to remove the thing sold from the ground, nor whether the subject of the sale would go to the heir or to the executor, or would or would not pass under a deed of the land itself, has proved satisfactory. Each of these distinctions has been advanced in some case only to be denied in the next.

Apparently it would have been wiser, or certainly more simple, to have held in the outset that the phrase "interest in land," meant some kind of *title*, *right*, or *property* in the land itself, some *estate*, either permanent or temporary, and not merely some transient or collateral *use*, *benefit*, or *advantage* from the land. Such a construction would have avoided the apparent inconsistency of allowing oral sales of annual crops to be valid, although they must remain several months in the ground, drawing nourishment and strength therefrom, and denying the same result to sales of trees, which stand only the same length of time, and without any perceptible increase in the mean time. It would also have avoided another equally unnecessary distinction of sustaining oral sales of other parts of the freehold, and denying the validity of sales of trees. But it is now probably too late to everywhere establish such a rule without legislative enactment.

Edmund H. Bennett.

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